No. 85-2079

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, et al.,
Petitioners,

vs.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION OF THE CONSTRUCTION LABORERS' TRUST FUNDS FOR SOUTHERN CALIFORNIA FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Supreme Court Rule 36(3), the Construction Laborers' Trust Funds for Southern California hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of counsel for the

petitioners and respondent was requested; counsel for petitioners consented but counsel for respondent refused.

INTEREST OF AMICI CURIAE

The interest of the Trust Funds in this case arises by reason of cases pending before the United States District Court for the Central District of California, in which the issue at bar has been raised; namely, whether the District Court lacks jurisdiction to hear the claims of these Trust Funds to enforce the terms of a collective bargaining agreement and trust agreements with regard to fringe benefit contributions which become due after expiration of the collective bargaining agreement.

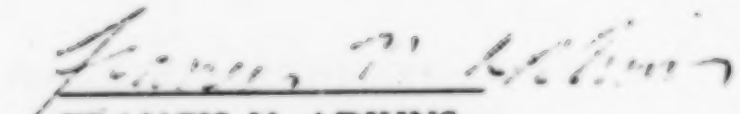
In the instant case, respondents, and the United States Court of Appeals for the Ninth Circuit, have taken the position that the District Court lacks jurisdiction to enforce the terms of the collective bargaining agreement and trust agreements after contract expiration. A ruling by this Court to that effect would be most damaging to Amici. The Trust Funds are concerned that the Court should be aware of the manifold ramifications of limiting jurisdiction of these matters to the National Labor Relations Board, especially with respect to the continued viability of multi-employer funds, as envisioned by Congress in expressly granting Federal Court jurisdiction when it enacted the Employee Retirement Income Security Act, 29 U.S.C. § 1000, et seq.

CONCLUSION

For the above stated reasons, we respectfully urge the Court to grant the motion for leave to file the accompanying *amicus* brief in the present case in support of Petitioners.

Respectfully submitted,

GALISKY & ADKINS



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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

I

INTEREST OF THE *AMICI CURIAE*

Amici Curiae, Construction Laborers' Trust Funds for Southern California, are comprised of four employee benefit plans:

Construction Laborers' Pension Trust for Southern California;

Laborers' Health and Welfare Trust for Southern California;

Construction Laborers' Vacation Trust for Southern California;

Laborers' Training and Re-Training Trust for Southern California.

Each of these Trusts is a multi-employer employee benefit plan created pursuant to collective bargaining agreements between employers and unions; each was organized and is administered pursuant to the provisions of Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 186(c)(5). Each Trust Fund receives contributions from employers on behalf of employees covered by the terms of the collective bargaining agreements.

Approximately 18,000 laborers are active participants in these *amici* Trust Funds. In addition, approximately 10,000 retired individuals are currently receiving pension benefits from *amicus* Construction Laborers' Pension Trust Fund for Southern California. Payments to these retirees find their source in the regular contributions made by employers. The health care benefits paid to active members are dependent upon eligibility sustained by continued contributions by their employers, even during contract negotiations.

Approximately 2,200 employers currently make contributions to these *amici* Trust Funds. The majority of the employers are signatory to collective bargaining agreements with triennial expiration dates. In 1983, 594 employers terminated their agreements with the Union; a large number of them negotiated new agreements. Within the past six months over 200 participating employers have sent termination notices to the union. Based on the previous reporting history of employers, and hours worked by their covered employees, these terminations represent a potential

loss of approximately $500,000.00 per month in fringe benefit contributions that the *amici* Trust Funds will be unable to collect through Federal Court action if the lower Court's opinion is allowed to stand. Additionally, fringe benefit contributions claimed by the Trust Funds in pending litigation over the 1983 terminations will be virtually lost to the Trust Funds and their beneficiaries, inasmuch as the 6-month statute of limitations for filing charges with the National Labor Relations Board had long since passed when the Ninth Circuit cut off jurisdiction.

These *amici* Trust Funds, therefore, have a substantial interest in the subject matter of the within Petition.

II

ARGUMENT

A. SECTIONS 502 AND 515 OF ERISA PROVIDE FOR AN INDEPENDENT BASIS FOR FEDERAL COURT JURISDICTION

Sections 502 and 515 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Sections 1132 and 1145, can be used as a basis for District Court jurisdiction to consider an employer's obligation to contribute fringe benefit contributions to multi-employer benefit plans pursuant to the terms of the Trust Plans after the expiration of its collective bargaining agreement.

Even though Section 515 of ERISA does not contain a separate, explicit definition of "obligation to contribute" as that found in Section 4212(a) of ERISA, 29 U.S.C. Section

1392(a),[1] Section 515 of ERISA does create a separate and distinct obligation to contribute. That obligation is stated in the disjunctive, that is, "under the terms of the plan or under the terms of the collective bargaining agreement."[2]

Congress has recognized that the obligation to contribute can arise under different circumstances. In this situation, it arises "under the terms of the plan" which continued or survived the expiration of the collective bargaining agreement.

To accept respondent's view that jurisdiction rests solely with the National Labor Relations Board would defeat ERISA's statutory goals and purposes merely because each chapter does not utilize exact uniformity of language. This is especially true where Section 515 of ERISA itself can be reasonably construed to implement Congressional intent.

Furthermore, Section 515 of ERISA actually provides for that uniformity of purpose by using the disjunctive form which recognizes the prior decisional authority relating to "survivabilty" of the plan terms.

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[1] Section 4212(a) provides: "(a) Definition. For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising —

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions."

[2] Section 515 provides: "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

For example, in *Hinson v. NLRB*, 428 F.2d 133 (8th Cir. 1970), the Court recognized "survivability" when it was confronted with an employer's argument that it would be illegal, pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. Section 186(c)(5), to pay fringe benefit contributions into a trust fund after expiration of the collective bargaining agreement and prior to impasse. The Court held that the trust agreements themselves survive the expiration of the collective bargaining agreement for purposes of satisfying the requirement for Section 302(c)(5)(b) of LMRA for a "written agreement with the employer." The Court went on to hold that:

> Since the status quo is quite obviously defined by reference to the substantive terms of the expired contract, it follows that, in a limited and special sense those pertinent contractual terms 'survive' the expiration date. See *NLRB v. Comills Corp.*, 373 F.2d 595, (4th Cir. 1967). In tandem with this 'survival,' the separate Trust Fund agreements have a continuing viability for petitioner as marking the framework under which benefit payments will be administered and disbursed . . .[3]

It is this reaffirmation of the concept of survivability, as expressed in Section 515 of ERISA in conjunction with Section 502 of ERISA, which gives rise to the legislative mandate requiring the District Courts to exercise

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[3] Accord, *Peerless Roofing Co., Ltd. v. NLRB*, 641 F.2d 734 (9th Cir. 1981); *Producers Dairy Delivery Co., Inc. v. Western Conference of Teamsters Pension Trust Fund*, 654 F.2d 625 (9th Cir. 1981).

jurisdiction where an employer fails to make contributions in accordance with the terms and conditions of the plan.[4]

Section 515 of ERISA augments and reflects the traditional requirement to maintain the status quo pending impasse and the Court, therefore, does not need to rely solely on Section 8(a)(5) of the National Labor Relations Act as amended (NLRA), 29 U.S.C. Section 158(a)(5), to generate a basis for the employer's obligation to contribute.

This is simplified by ERISA's directive that "nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supercede any law of the United States . . . " Section 514 of ERISA, 29 U.S.C. Section 1144.

Section 515 of ERISA does not supercede, but rather, is a mirror image of the NLRA's statutory obligation to maintain the status quo, pursuant to Section 8(a)(5) of the NLRA, and enhances that image by providing a more effective forum to seek redress for the breach of the employer's obligation to contribute.[5]

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[4] Congress also recognized that the obligation to contribute was not without some limitation and included the qualification that the employer is obligated to contribute so long as that obligation is not inconsistent with law. The use of the phrase "to the extent not inconsistent with law" recognizes, as did the Court in *Hinson, supra*, that contributions can only be made to trust funds so long as they meet the requirements of Section 302(c)(5)(b) of ERISA, or are not illegal under some other statutory scheme. *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72 (1982).

[5] The concept of an election between equally available Federal remedies was recognized in *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 635 N. 17 (1975), wherein the Court stated that "In most cases a decision that state law if pre-empted leaves the parties with recourse only to the federal labor law, as enforced by the NLRB. *See Lockridge, supra; San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). But in cases like this one, where there is an independent federal remedy that is consistent with the NLRA, the parties may have a choice of federal remedies. *Cf. Vaca v. Sipes*, 386 U.S. 171, 176-188 (1967); *Smith v. Evening News Assn.*, 371 U.S. 195 (1962)."

B. THE COURT'S CONSIDERATION OF THE NLRA IS COLLATERAL TO THE PRIMARY ISSUE OF THE EMPLOYER'S VIOLATION OF SECTION 515 OF ERISA

Upholding the District Court's jurisdiction under Sections 502 and 515 of ERISA, 29 U.S.C. Sections 1132 and 1145, is consistent with those cases which have held that District Court jurisdiction is proper even where the issues raised would normally be considered in the context of a "board" proceeding.

In *Kaiser Steel Corporation v. Mullins*, 445 U.S. 72, (1982), citing *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), this Court held that:

> " 'the Federal Courts may decide Labor Law questions that emerge as collateral issues in suits brought under independent Federal remedies, including the Anti-Trust Laws.' "

This action involves the independent Federal remedy created by Section 515 of ERISA and is co-extensive with the obligation to maintain the status quo under Section 8(a)(5) of the NLRA. Therefore, the Court's consideration of Section 8(a)(5) of the NLRA is collateral to the primary issue of the employer's violation of Section 515 of ERISA.

This is further demonstrated by reference to the relief sought by petitioners; that is, enforcement of the employer's obligation to make contributions under the terms of the plan, and not an order compelling the employer to collectively bargain with the Union.[6]

In addition, the Courts have not hesitated to assume jurisdiction where contract actions have necessarily involved an infringement upon areas traditionally reserved for the National Labor Relations Board. Those areas have included: a determination as to the illegality of a contract under Section 8(e);[7] the violation of Federal anti-trust laws;[8] and, breaches of collective bargaining agreements, even though a breach may also constitute an unfair labor practice.[9]

Allowing jurisdiction to consider an employer's obligation pursuant to the plan terms and after contract expiration represents only a minor intrusion into an area of traditional Board jurisdiction. The Courts are fully competent to make determinations regarding the extent of an employer's monetary obligations and a determination as to when impasse has been reached.[10]

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[6] *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938), wherein the Court stated that the objective of the National Labor Relations Act with respect to collective bargaining between an employer and an employee organization was "the making of contracts with labor organizations."

[7] *Kaiser Steel Corporation v. Mullins, supra.*

[8] *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975)

[9] *William E. Arnold Co. v. Carpenters*, 417 U.S. 12 (1974); *Smith v. Evening News Association*, 371 U.S. 195 (1962)

[10] *Woodward Sand Company, Inc. v. Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691 (9th Cir. 1981), wherein the Court, in the context of determining withdrawal liability pursuant to MPPAA, directed the District Court to determine whether or not impasse had occurred. The determination of impasse in the Woodward Sand context is no different than a determination of impasse relative to an employer's obligation to contribute pursuant to Section 515 after contract expiration.

C. REQUIRING RESORT TO THE NLRB RUNS CONTRARY TO THE EXPRESS PURPOSES OF ERISA AND NEEDLESSLY LENGTHENS LITIGATION

It is well established that the National Labor Relations Act is a remedial statute, *NLRB v. Food Store Employees Local 347 (Heck's Inc.)*, 471 U.S. 1 (1974), and relief under the Act is traditionally limited to back-pay,[11] or an order to cease and desist an unfair labor practice (such as failure to bargain in good faith).[12] ERISA and the MPPAA[13] were congressional attempts to stem the rising tide of Trust Fund delinquencies when the mechanisms available through the Board were shown to be inadequate. The legislative history is replete with expressions of congressional dissatisfaction with remedies theretofore available, either through the Board or through State Courts.

The Courts have recognized this legislative intent. In *Laborers' Fringe Benefit Funds — Detroit & Vicinity v. Northwest Concrete & Const., Inc.*, 640 F.2d 1350, 1352 (6th Cir. 1981), the Court stated:

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[11] *F. W. Woolworth Company and Retail Clerks International Association (AFL)*, 90 NLRB 289 (1950)

[12] *Mar-Jac Poultry Company, Inc. and Local 454 Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO*, 136 NLRB 785 9 (1962)

[13] Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208.

The legislative history underlying Section 502 [29 U.S.C. § 1132] indicates that Congress intended that the enforcement provisions should have teeth: the provisions should be liberally construed to 'provide both the Secretary [of Labor] and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act.' H. R. REP. No. 93-533, 93d CONG. & AD. NEWS 4639, 4655. This history further states that '[T]he intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appears to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants.'

Again, the overriding congressional concern over the Trust Funds' ability to pursue enforcement of the plan terms was recognized by the Court in *Central States Southeast and Southwest Areas Pension Funds v. Alco Express Co.*, 522 F.Supp. 919, 926 (E.D. Mich. 1981), wherein the Court stated that:

> From the inception of Section 306 [29 U.S.C. § 1132(g) and 1145] in 1978 to its birth in 1980 [by the MPPAA], its gestation period was accompanied by an acute parental concern over the adverse effect of delinquencies on multiemployer plans and the need to strengthen ERISA to enhance the ability of multiemployer plan trustees to enforce employer obligations to make contributions and to discourage delinquency.

Requiring the Trust Funds to resort to the NLRB would not only hinder enforcement of the employer's obligation to

contribute as defined by the plan terms, but would also defeat the clear congressional intent to have the express ERISA remedies enforced in Federal District Court. In addition to the collection of unpaid fringe benefit contributions and, consistent with this legislative intent, ERISA provides for: plan-authorized prejudgment interest; plus the greater of interest on the unpaid contributions or plan-authorized liquidated damages; and, costs of the action and reasonable attorney's fees, Section 502(g)(2) of ERISA, 29 U.S.C. Section 1132(g)(2). The so-called "double interest" provision of Section 502(g)(2)(c) of ERISA, Section 1132(g)(2)(c), is clearly designed to have a deterrent effect on those employers who might be inclined to withhold contributions. *Central States, etc. v. Alco Express, supra*, at 931.

As further evidence of the importance of securing fringe benefit payments through the District Courts, Section 502(a)(3)(A) of ERISA, 29 U.S.C. Section 1132, provides a quick avenue by which to seek injunctive relief. The Courts have readily granted such relief in favor of multi-employer funds against delinquent employers. *Laborers Fringe Benefit Funds v. Northwest Concrete, etc., supra*, at 1351-52; *Huge v. Long's Hauling Co., Inc.*, 590 F.2d 457 (3rd Cir. 1978); *Van Drivers Union, Local No. 392 v. Nealy Moving & Storage*, 551 F.Supp. 429 (N.D. Ohio, 1982).

The Ninth Circuit's decision herein negates the remedies provided by Congress in ERISA by forcing the Trust Funds to resort to the National Labor Relations Board when the plan terms are still in effect.

Not only will the remedies provided by ERISA be lost to the Petitioners if the decision stands, but a resort to the National Labor Relations Board adds time-consuming extra proceedings to actions to enforce the plan terms. Moreover,

it is precisely this time-consuming process which Congress intended to avoid by providing jurisdiction in the District Courts pursuant to Section 515 of ERISA.

The necessity of providing an effective and speedy remedy for ERISA enforcement is illustrated by the complexity and uncertainty in resorting to the National Labor Relations Board. For example, the Trust funds would first have to file a charge with the appropriate Regional office.[14] Investigation of the claim by the Regional office typically takes thirty (30) days. If the Region decides to proceed, a complaint is filed.[15] After a mandatory settlement conference[16] the matter is calendared to be heard before an Administrative Law Judge[17] (usually many months later). If the employer files exceptions to the findings of the Administrative Law Judge,[18] the matter is put before the Board itself. The current backlog of cases on appeal to the Board, in some instances well over three (3) years, has been the subject of recent congressional criticism. The Board's orders are not self-enforcing, and the General Counsel must move for enforcement proceedings before the appropriate Circuit Court. Thus, an intervening period of up to five (5) years before an enforceable Court Order is obtained would supplant the direct access to the Courts clearly intended by Congress.

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[14] Rules and Regulations of the National Labor Relations Board, 29 C.F.R. § 102.9

[15] 29 C.F.R. § 102.15

[16] NLRB Case Handling Manual, Pt. 1, Unfair Labor Practice Proceedings, ¶¶ 10124-10194

[17] 29 C.F.R. § 102.34

[18] 29 C.F.R. § 102.46

III

CONCLUSION

For the reasons given above, the petition for a Writ of Certiorari should be granted.

Dated: July 14, 1986

Respectfully submitted,

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